INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	3
Argument	10
Conclusion	14

CITATIONS

Cases:

Adams v. *United States*, 128 F. (2d) 820, certiorari denied, October 12, 1942, No. 313 — 10
Brimie v. *United States*, 200 Fed. 726 — 11
Brock v. *Hudspeth*, 111 F. (2d) 447 — 12
Coco v. *United States*, 289 Fed. 33 — 11
Culjak v. *United States*, 53 F. (2d) 554 — 10
Dolan v. *United States*, 133 Fed. 440 — 12
Jordan v. *United States*, 120 F. (2d) 65, certiorari denied, 314 U. S. 608 — 10
McElroy v. *United States*, 164 U. S. 76 — 11
Pointer v. *United States*, 151 U. S. 396 — 10
Ralston v. *Cox*, 123 F. (2d) 196, certiorari denied, 315 U. S. 796 — 14
Schefano v. *United States*, 84 F. (2d) 513 — 12
Todd v. *United States*, 48 F. (2d) 530 — 10
United States v. *Kelley*, 105 F. (2d) 912 — 10
United States v. *Perlstein*, 120 F. (2d) 276 — 10, 11
United States v. *Rabinowich*, 238 U. S. 78 — 12

Statutes:

Section 37 of the Criminal Code (18 U. S. C. 88) — 3
Section 2810 of the Internal Revenue Code (26 U. S. C. 2810) — 2
Section 2833 of the Internal Revenue Code (26 U. S. C. 2833) — 3

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 682

CONSTANT G. TUFFANELLI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The majority opinion in the circuit court of appeals (R. 146–150) and the opinion of Circuit Judge Major dissenting in part (R. 151–152) are reported at 131 F. (2d) 890.

JURISDICTION

The judgment of the circuit court of appeals was entered December 9, 1942 (R. 153), and a petition for rehearing was denied December 28, 1942 (R. 154). The petition for a writ of certiorari was filed January 29, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February

13, 1925. See also Rule XI of the Rules of Practice and Procedure in Criminal Cases, promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether there was misjoinder of offenses and of parties defendant.

2. Whether there was sufficient evidence to support petitioner's conviction of carrying on the business of a distiller without having given a bond, as alleged in count two of the indictment.

3. Whether, in view of the fact that several of the counts of the indictment had been *nolle prossed,* the trial court erred in providing the jury with summaries of the counts submitted to them instead of giving the jury the indictment itself.

STATUTES INVOLVED

Section 2810 of the Internal Revenue Code (26 U. S. C. 2810) provides in part:

> Every person having in his possession or custody, or under his control, any still or distilling apparatus set up, shall register the same with the collector of the district in which it is * * *. Stills and distilling apparatus shall be registered immediately upon their being set up.
>
> * * * * *
>
> And every person having in his possession or custody, or under his control, any still or distilling apparatus set up which is not so registered, shall pay a penalty of $500, and shall be fined not less than $100,

> nor more than $1,000, and imprisoned for not less than one month, nor more than two years.
>
> * * * * *

Section 2833 of the Internal Revenue Code (26 U. S. C. 2833) reads:

> Any person who shall carry on the business of a distiller without having given bond as required by law, or who shall engage in or carry on the business of a distiller with intent to defraud the United States of the tax on the spirits distilled by him, or any part thereof, shall, for every such offense, be fined not less than $100 nor more than $5,000 and imprisoned for not less than thirty days nor more than two years. * * *
>
> * * * * *

Section 37 of the Criminal Code (18 U. S. C. 88) provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

STATEMENT

Petitioner was tried in the District Court for the Northern District of Illinois together with Bonarski, Ostrowski, and Ptaszynski on an indictment in ten counts (R. 2–10). The first count charged that they possessed an unregistered still

at a stated address (R. 2); the second, that they carried on the business of a distiller at that address without giving bond (R. 3); and the third, that at the same place they carried on the business of a wholesale liquor dealer without paying the tax (R. 3).

The fifth, seventh, and eighth counts[1] charged that the defendants on specified occasions removed alcohol with intent to defraud the United States of taxes (R. 4, 5).

The tenth count charged a conspiracy to commit the offenses alleged in the earlier counts (R. 6–10).

The pertinent parts of the evidence may be summarized as follows:

Petitioner was the ringleader of a group engaged in the manufacture, sale, and distribution of non-tax-paid liquor in and around Blue Island, Illinois (R. 16, 19, 20, 24, 28). He was introduced to an agent of the Alcohol Tax Unit, Joseph R. Mastrandrea, by one John Perigo, an informer and former bootlegger who stated that he and Mastrandrea were partners and that Mastrandrea was a former "moonshiner" and prospective customer for alcohol (R. 14, 21, 23, 24, 26). Perigo told petitioner that he wished "to go back into the liquor business" and asked petitioner if he could sell him some liquor (R. 14, 21). Petitioner replied that because of the pres-

[1] The fourth, sixth, and ninth counts were *nolle prossed* prior to the trial (R. 11–12).

sure resulting from an anti-liquor drive by Government agents he was not in the "business" any longer but that he knew of a "young fellow" who "has a small plant and is looking for customers right now" (R. 14, 24). Petitioner then told Mastrandrea that the price would be $11.50 per five-gallon can and designated a time and place at which Mastrandrea should meet him to obtain the alcohol (R. 15). When they met on April 16, 1940, petitioner introduced Mastrandrea and Perigo to the defendant Bonarski, who took Mastrandrea's car (R. 15–16). While waiting for Bonarski to return, petitioner told Mastrandrea that he was busy at the time running a cola business, "but as soon as it can run by itself, I can run the alcohol business myself; that is the reason I am having Wally [Bonarski] do it now." When Bonarski returned, Mastrandrea asked petitioner whom he was to pay and was told to pay Bonarski. Mastrandrea also asked petitioner the degree of proof of the alcohol and was told it would be about 186 or 187 and that if Bonarski failed to treat him "right" or the alcohol wasn't as represented "you come to me and I will make it right." After Mastrandrea had left in his car he examined it and found eight five-gallon cans of alcohol. (R. 16.)[2]

---

[2] This procedure of exchanging cars with the purchaser was apparently the usual method employed by the ring in effecting sales (See R. 31–32, 47–50, 52, 54, 65–66, 68, 70–71).

A few days later Mastrandrea and Perigo went to petitioner's home and there saw Bonarski, who told them that the still had broken down. Mastrandrea insisted that he needed alcohol and arranged to meet Bonarski again. (R. 16–17.) At this later meeting Bonarski said that he had been unable to get any alcohol because of the pressure of the Government's anti-liquor drive (R. 17, 27).[3]

On a subsequent occasion Bonarski introduced the agents to the defendant Ostrowski with the statement, "You will be getting stuff from him when I am not around" (R. 18; see also R. 27). Several days later the agents contacted Bonarski and arranged another purchase of alcohol. When they met on May 6, 1940, at the appointed place, Bonarski took the agents' car and Ostrowski drove the agents around in his car for about 15 minutes. Ostrowski told the agents that he "and Wally and Babe [petitioner—R. 25] are all in together, it is all one outfit," and that "Babe is the boss." (R. 19; see also R. 28.) When Bonarski returned he was paid by the agents, who took their car and upon examination found that it contained 15 cans of alcohol (*ibid.*).

At a later date the agents complained to Bonarski that the proof of the alcohol was not satisfactory and told him they were going to take it up with petitioner. Bonarski said that it was "all

[3] On this and subsequent occasions Mastrandrea was accompanied by Nicholas P. Mauro, another disguised agent of the Alcohol Tax Unit (R. 17, 26–31).

right" with him. When the agents complained to petitioner at the latter's home, petitioner replied, "If it is supposed to be 188, you ought to have 188 proof. * * * Fix it up with Walter, he will be here soon." (R. 20; see also R. 28–29.) Bonarski came in and the matter was adjusted by promising the agents one free can on their next purchase (R. 20, 29).

Petitioner owned a Studebaker coupe which he had purchased under the alias of Stern (R. 55–59). On many occasions this car was seen being driven by either Bonarski or Ostrowski, and it was used frequently in the exchange of cars while alcohol was being loaded into the purchaser's automobile (R. 41, 42, 48, 50, 51, 66, 67, 69, 70, 74). On one occasion Bonarski was seen running from a building with Government agents in hot pursuit. He jumped into petitioner's car, which was driven by Ostrowski, and rode away at a high rate of speed. (R. 51, 67, 70, 74.) Approximately thirty minutes later petitioner and Bonarski were seen together in Bonarski's car (R. 51, 70).

An Alcohol Tax Unit Agent testified that on July 12, 1940, he and other agents entered a building on the rear of the lot at 2332 West Grove Avenue, Blue Island, Illinois, and found a complete continuous process type still. There were also four wooden mash vats, each with a capacity of about 6,700 gallons. It was estimated that the still was capable of manufacturing 1,800 gallons of 100 proof alcohol per day. (R. 79.) Although

no one was in the building at the time and the agents found no materials, mash, or alcohol, "There was just the smell they had been there" and spilled sugar was found. In addition, "The still was set up for operation. You could light the oil burner, supply the mash and she was ready to go." (R. 79–80.)

One Raymond Bender, a water meter reader, testified that on June 7, 1940, he went to read the meter in a pit in front of the premises at 2332 Grove Avenue. At that time the water was turned on into a lumber yard at that address. Bender found a pipe running to the building at the rear, and he shut off the water running into the building. He returned the next day and took out the connection that supplied the building. At that time he saw petitioner, who asked him if he "had learned to take money yet." Bender replied, "No," and petitioner stated, " 'Well, I saw you down at the meter pit, we have to have water back there in the building' * * * there was something in the building would spoil." (R. 75–76.) On July 13, 1940, the day after the seizure of the still at 2332 Grove Avenue, Bender was reading meters in the neighborhood of petitioner's home in another part of the city. When he entered petitioner's home, petitioner said to him, "Something happened yesterday, there will be an investigation, don't say anything." (*Ibid.;* see also R. 81–83.)

Petitioner did not raise any question concerning the joinder of defendants and offenses prior to

the trial, but at the close of the Government's case and again at the close of all the evidence petitioner moved for a directed verdict on that ground (R. 86, 98–99, 114–115, 116–117). The motions were denied (R. 87, 98–99, 115). The case went to the jury against petitioner on counts 1 and 2 (possession and operation of the still), count 3 (doing a wholesale liquor business), counts 7 and 8 (removals of alcohol), and count 10 (the conspiracy count). Against Bonarski and Ostrowski the case was submitted upon those same counts except that counts 1 and 2 (charging possession and operation of the still) were dropped. (R. 86–87, 111.)[4] The jury returned verdicts of guilty on the foregoing counts (R. 117–118). Petitioner was sentenced to imprisonment for three years and three days (R. 128).

Petitioner and Bonarski alone appealed. The circuit court of appeals reversed the judgments as to count 3 because there was no proof that the wholesale business was carried on at the place charged in the indictment (R. 146–147). It also reversed the judgment against petitioner on counts 7 and 8 and the judgment against Bonarski on count 8 on the ground that the evidence was insufficient (R. 148). The result is that on the substantive counts petitioner stands convicted of

[4] Count 5 was *nolle prossed* as to all the defendants prior to the close of the Government's case (R. 81) and the remaining counts were *nolle prossed* as to individual defendants at subsequent stages of the trial (R. 86–87, 99, 115).

possessing and operating the still and Bonarski of removing alcohol to evade the tax, and on the conspiracy count, both stand convicted of conspiring to commit one or more of the crimes charged in the substantive counts.

ARGUMENT

I

No question for further review is presented by petitioner's contention (Pet. 9–12, 14–20) that there was a misjoinder of offenses and defendants. As pointed out in *United States* v. *Perlstein,* 120 F. (2d) 276, 281 (C. C. A. 3), upon which petitioner relies, the issue turns upon "a choice between the economy of a single trial of issues which are closely related, on the one hand, and the safeguarding of the defendant from the possibility of prejudice arising from the multiple charges on the other hand," and consequently the trial court has a wide discretion upon the facts of the particular case. Cf. *Pointer* v. *United States,* 151 U. S. 396.

In the instant case the joinder was clearly proper.[5] The substantive offenses charged were all offenses against alcohol tax laws; and the in-

[5] See *Adams* v. *United States,* 128 F. (2d) 820, 821–822 (C. C. A. 5), certiorari denied, October 12, 1942, No. 313; *Jordan* v. *United States,* 120 F. (2d) 65, 66 (C. C. A. 5), certiorari denied, 314 U. S. 608; *United States* v. *Kelley,* 105 F. (2d) 912, 916–917 (C. C. A. 2); *Culjak* v. *United States,* 53 F. (2d) 554 (C. C. A. 9); *Todd* v. *United States,* 48 F. (2d) 530, 531–532 (C. C. A. 5).

dictment charged and the evidence showed that the defendants had joined in an illegal conspiracy to violate those laws. Therefore, the substantive offenses were not, as the dissenting judge thought, "related only in that they were violations of the Revenue Act" (R. 151). They were related transactions arising out of the conspiracy and were part of the single illegal enterprise upon which the defendants had embarked.

The fact that there was this common enterprise, even though different defendants may have committed different specific criminal acts, distinguishes the instant case from the cases on which petitioner relies—*McElroy* v. *United States,* 164 U. S. 76; *Coco* v. *United States,* 289 Fed. 33 (C. C. A. 8); and *Brimie* v. *United States,* 200 Fed. 726 (C. C. A. 7). In the *McElroy* case this Court emphasized (p. 79) that there was no connection between the acts charged in the four indictments tried together and no showing of any conspiracy among the defendants. Likewise in both the *Coco* and the *Brimie* cases the crimes and defendants joined were in fact utterly disassociated one from another. Hence, the alleged conflict of decisions (Pet. 10) does not exist.[4]

The further contention that there was a misjoinder of defendants in the conspiracy count (Pet. 11–12, 20) falls with the contention last discussed. Furthermore, the argument rests wholly

[4] Contrary to petitioner's statement, the joinder was not held improper in *United States* v. *Perlstein,* 190 F. (2d) 270 (C. C. A. 3).

upon an unsound premise. Petitioner argues that he could not be guilty of conspiring with another defendant to commit one of the substantive crimes because no other defendant was found guilty on counts 1 and 2, the only substantive counts on which petitioner's conviction was sustained. But of course it was not necessary to show that two defendants had committed the same substantive crime in order to convict them of the conspiracy. It was sufficient to prove that petitioner and a co-defendant agreed to commit any one of the offenses and that one of them did an overt act.[7] Thus, the jury might have found that petitioner and Bonarski conspired to possess and operate the still (counts 1 and 2) or to remove alcohol to evade taxes (count 7) and that one of them did an overt act alleged; and this would have been sufficient although only one of them went further and committed a substantive crime.[8]

II

Petitioner's contention (Pet. 12, 20–21) that the evidence was insufficient to sustain his conviction of carrying on the business of a distiller as alleged in count 2, is without merit. The evidence, sum-

[7] *United States* v. *Rabinowich*, 238 U. S. 78, 86; *Brock* v. *Hudspeth*, 111 F. (2d) 447, 448 (C. C. A. 10); *Schefano* v. *United States*, 84 F. (2d) 513, 515 (C. C. A. 5).

[8] Moreover, petitioner was not prejudiced by the joinder either of counts or defendants (see *Dolan* v. *United States*, 133 Fed. 440, 446 (C. C. A. 8)) and his argument (Pet. 18–19) that but for it he would not have been convicted on counts 1 and 2 is based upon sheer speculation (see pp. 4–8, *supra*).

marized in the Statement, pp. 4–8, *supra,* proved beyond question that a still was being operated at 2332 Grove Street and that petitioner was the "boss" of the illicit enterprise.

III

At the conclusion of the trial, and before the judge had instructed the jury, he requested the prosecutor to prepare summaries of the counts on which the case was to go to the jury. The purpose was to give the jury the summaries and thus to avoid any prejudice to the defendants which might result from giving the jury, in accordance with the usual practice, the indictment itself, including the counts which had been *nolle prossed.* Petitioner objected only to the summaries of counts 1, 2, and 3 on the ground that they did not state the date and place at which the offense was alleged to have been committed; his objection was overruled and the summaries were submitted to the jury. (R. 100–103.)

Petitioner now contends (Pet. 12–13, 21–25) that this constituted an improper amendment of counts 1 and 2 because the summations of those counts omitted any reference to date and place.[9] The contention is untenable. The procedure adopted was to petitioner's advantage for it withheld from the jury the counts which had been *nolle prossed* and thus precluded any possibility

[9] Petitioner's objection also went to count 3, but as we have seen (*supra,* p. 9), the court below reversed the conviction on that count.

that the jury might be influenced by having those counts before them. Moreover, the omission of the date and place of the alleged offenses was supplied in the instructions to the jury; the judge specifically stated that counts 1, 2, and 3 charged that the offenses were committed "at 2332 Grove Avenue" on "July 12, 1940" (R. 106), and that the burden was upon the Government to prove beyond a reasonable doubt every allegation of each of these counts, including the allegations as to time and place (R. 106–107).[10]

CONCLUSION

The decision below is correct, and there is involved no conflict of decisions or question of general importance. We respectfully submit, therefore, that the petition for a writ of certiorari should be denied.

CHARLES FAHY,
Solicitor General.
WENDELL BERGE,
Assistant Attorney General.
ROBERT S. ERDAHL,
ARCHIBALD COX,
J. BENSON SAKS,
Attorneys.

FEBRUARY, 1943.

---

[10] The cases cited by petitioner (Pet. 13, 24) in support of this contention deal with *amendment* of an indictment and are therefore inapplicable. The counts in question were not altered in any respect. Cf. *Ralston* v. *Cox*, 123 F. (2d) 196 (C. C. A. 5), certiorari denied, 315 U. S. 796.

U. S. GOVERNMENT PRINTING OFFICE: 1943